

**VASANTHI RAJAMANIKAM**

A

**v.**

**KALAISELVI PERUMAL**

COURT OF APPEAL, PUTRAJAYA

B

LOW HOP BING JCA

ZAHARAH IBRAHIM JCA

AZIAH ALI JCA

[CIVIL APPEAL NO: W-02(IM)-404-02-2012]

15 MAY 2012

C

**CIVIL PROCEDURE:** *Judgment - Admission - Application for - Misappropriation of funds - Whether admission of facts contained in written confession and settlement agreement falls within ambit of O. 27 r. 3 Rules of the High Court 1980 - Whether application challenged*

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**CIVIL PROCEDURE:** *Affidavits - Affidavit-in-reply - Filing out of time - Whether assertion deemed admitted - Ng Hee Thoong & Anor v. Public Bank Bhd*

This was an appeal by the appellant against the High Court's decision in dismissing the appellant's application for judgment to be entered under O. 27 r. 3 Rules of the High Court 1980 ('RHC') against the respondent in the sum of RM1,200,000 ('the said sum'). The respondent was employed as a clerk in the appellant's law firm and was alleged to have misappropriated the firm's funds beginning from 2006. This fact was however admitted by the respondent. Following that, the appellant claimed for the said sum based on the respondent's admissions as executed and contained in the written confession and settlement agreement. The appellant submitted that there were merits in her application since: (i) the respondent's affidavit-in-reply had been filed out of time without any appropriate reason; and (ii) the respondent had abandoned her application for extension of time to file the said affidavit. The issue that arose for consideration based on the admissions contained in the respondent's written confession and the settlement agreement was whether the High Court was correct in dismissing the appellant's application for judgment in the said sum pursuant to O. 27 r. 3 RHC.

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**A Held (allowing appeal; setting aside order of High Court)**  
**Per Low Hop Bing JCA delivering the judgment of the court:**

- B** (1) Order 27 r. 3 RHC empowers the High Court to enter a judgment or order upon a party's admission. The learned High Court judge erred in law and in fact in holding that the respondent was under duress, undue influence and coercion when the contemporaneous documents *viz* the written confession and the settlement agreement showed otherwise. (paras 13 & 16)
- C** (2) The admissions of fact contained in the written confession and the settlement agreement came within the ambit of O. 27 r. 3 RHC. On the facts, the respondent's affidavit-in-reply was filed out of time and she had abandoned her application for extension of time to admit the affidavit. As a result, the said affidavit was not admitted at the hearing of the appellant's application under O. 27 r. 3 RHC. In the circumstances, the appellant's affidavit-in-support pertaining to the written confession and settlement agreement remained unchallenged. Hence, the appellant's assertion was deemed to have been admitted by the respondent (*Ng Hee Thoong & Anor v. Public Bank Bhd*; *refd*). (para 15)

*[Judgment entered under O. 27 r. 3 RHC for the appellant in the sum of RM1,200,000].*

**F Bahasa Malaysia Translation Of Headnotes**

- G** Ini adalah rayuan perayu terhadap keputusan Mahkamah Tinggi dalam menolak permohonan perayu untuk penghakiman di bawah A. 27 k. 3 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') terhadap responden bagi jumlah RM1,200,000 ('jumlah tersebut'). Responden telah bekerja sebagai kerani di firma guaman perayu dan telah dituduh menyalahgunakan dana firma bermula dari tahun 2006. Fakta ini walau bagaimanapun, telah diakui oleh responden.
- H** Berikutan itu, perayu menuntut bagi jumlah tersebut berdasarkan pengakuan responden seperti dimeterai dan terkandung di dalam pengakuan bertulis dan perjanjian penyelesaian. Perayu berhujah bahawa terdapat merit di dalam permohonan beliau memandangkan: (i) affidavit jawapan responden telah difailkan di luar masa tanpa sebarang alasan munasabah; dan (ii) responden telah mengabaikan permohonan untuk pelanjutan masa bagi
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memfailkan affidavit tersebut. Isu yang dibangkitkan berdasarkan pengakuan yang terkandung di dalam pengakuan bertulis dan perjanjian penyelesaian adalah sama ada Mahkamah Tinggi betul dalam menolak permohonan perayu bagi penghakiman dalam jumlah tersebut di bawah A. 27 k. 3 KMT.

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**Diputuskan (membenarkan rayuan; mengenepikan perintah Mahkamah Tinggi)**

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**Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:**

(1) Aturan 27 k. 3 KMT memberi kuasa kepada Mahkamah Tinggi untuk memasukkan penghakiman atau perintah atas pengakuan seseorang pihak. Yang arif hakim Mahkamah Tinggi khilaf dari segi undang-undang dalam memutuskan bahawa responden di bawah tekanan, pengaruh tak wajar dan terpaksa apabila dokumen-dokumen semasa iaitu pengakuan bertulis dan perjanjian penyelesaian menunjukkan sebaliknya.

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(2) Pengakuan fakta, yang terkandung di dalam pengakuan bertulis dan perjanjian penyelesaian, terjatuh di bawah lingkungan A. 27 k. 3 KMT. Berdasarkan fakta, affidavit jawapan responden difailkan di luar masa dan beliau telah mengabaikan permohonannya untuk pelanjutan masa bagi mengemukakan affidavit itu. Sebagai balasan, affidavit tersebut tidak dikemukakan semasa pendengaran permohonan perayu di bawah A. 27 k. 3 KMT. Dalam keadaan ini, affidavit sokongan perayu berkenaan pengakuan bertulis dan perjanjian persetujuan tetap tidak dicabar. Oleh itu, pengatahan perayu disifatkan diterima oleh responden.

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*[Penghakiman dimasukkan di bawah A. 27 k. 3 KMT bagi pihak perayu untuk jumlah RM1,200,000].*

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**Case(s) referred to:**

*Aetna Universal Insurance Sdn Bhd v Fire Accident & Marine Sdn Bhd* [2001] 4 CLJ 753 HC (*refd*)

*Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609 CA (*refd*)  
*Pembinaan SKY Sdn Bhd v. Sykt Federal Furniture Construction & Engineering Works* [1991] 1 CLJ 678; [1991] 1 CLJ (Rep) 346 SC (*refd*)

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*Tom Manas Enterprise Sdn Bhd v. Soh Ah Wah* [1995] 3 CLJ 610 HC (*refd*)

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*Vithal Kumar Jayaraman v. Azman Md Nor* [2010] 3 CLJ 332 CA (*refd*)

**A Legislation referred to:**

Rules of the High Court 1980, O. 27 r. 3

*For the appellant - Low Eu Thuan; M/s Cheong Wai Meng & Van Buerle*

*For the respondent - Ramesh Sivakumar; M/s Ramesh & Loo*

**B** *[Appeal from High Court, Kuala Lumpur; Civil Suit No: S-22-281-2010]*

*Reported by Kumitha Abd Majid*

**C JUDGMENT****Low Hop Bing JCA:****Appeal**

- D** [1] This appeal filed by the appellant (defendant 1) is directed against the decision of the learned High Court Judge who had dismissed defendant 1's summons in chambers praying that judgment be entered under O. 27 r. 3 of the Rules of the High Court 1980 (O. 27 r. 3) against the respondent (plaintiff) for
- E** RM1,200,000, being part of defendant 1's counterclaim against the plaintiff.

**Factual Background**

- F** [2] Defendant 1's counterclaim against the plaintiff was for, *inter alia*, a sum of RM2,219,126.24 being money allegedly misappropriated by the plaintiff who was at the material time employed by defendant 1 as a clerk in defendant 1's law firm (the law firm).
- G** [3] Defendant 1's summons in chambers sought judgment in the sum of RM1,200,000 based on the plaintiff's admissions contained in the written confession and settlement agreement, both dated 29 December 2009.
- H** [4] The plaintiff's duties included, *inter alia*, handling the accounts, issuance of cheques and liaising with banks for balances in the law firm.
- I** [5] On 27 December 2009, defendant 1 discovered that the plaintiff had tampered with cheque No. 748065 dated 24 December 2009 for RM3,150 by amending the amount to RM13,150. The plaintiff had also not deposited cash amounting to RM6,800 into the law firm's bank account.

[6] When defendant 1 conducted an investigation, the plaintiff confessed to defendant 1 that she (the plaintiff) had misappropriated the law firm's funds beginning from 2006. A

[7] On 29 December 2009, the plaintiff in her own handwriting and on her own accord confessed, voluntarily and freely, without any duress, undue influence or coercion, that she had issued cheques in her own name and banked into her own savings account, ie, CIMB No. 14030224563529. Some RM600,000 to RM800,000 had been taken by her to pay for her car instalments, house loan, jewellery, vacation, credit cards etc. B C

[8] The plaintiff also executed the settlement agreement which was prepared by solicitors Chanthiran & Co, in which she admitted she had committed criminal breach of trust and fraud (collectively, the fraudulent acts) on defendant 1. The settlement agreement was witnessed by Commissioner for Oaths Hariramas Palaya and Accountant Gamini Rodrigo. The fraudulent acts had been committed by her over a period of five years *viz* from 2005 to 2009 by transferring or causing to transfer monies belonging to the law firm to the plaintiff's CIMB account. The plaintiff admitted that by her own fraudulent acts, she had unjustly and unlawfully enriched herself and was now desirous of repaying the amount which she had obtained as a result of her fraudulent acts. The total outstanding sum due and owing by the plaintiff to defendant 1 as at 29 December 2009 was RM1,200,000 which the plaintiff agreed to repay by: D E F

- (1) signing a power of attorney in favour of defendant 1 to sell, rent and/or deal with the plaintiff's properties, including a Toyota Camry car bearing registration No. WQK 2666; G
- (2) returning all monies deposited in the plaintiff's bank accounts;
- (3) returning all jewellery and personal items purchased by means of the plaintiff's ill-gotten gains; and
- (4) paying a sum of RM5,000 per month by the 7th day of each month commencing January 2010 until December 2013. H

**Merits Of Defendant 1's Application Under O. 27 r. 3**

[9] Defendant 1's learned counsel Mr Low Eu Thuan submitted that there are merits in defendant 1's application under O. 27 r. 3 as the plaintiff's affidavit in reply has been rightly rejected by I

A the learned High Court judge, as it was filed out of time without any appropriate reason and the plaintiff has abandoned her application for extension of time to file the said affidavit in reply.

B [10] Learned counsel, Mr Ramesh Sivakumar, responded for the plaintiff that O. 27 r. 3 would only apply if the plaintiff's admission is unequivocal, clear and positive, but it is not the case in the instant appeal.

[11] The question which we must address herein is:

C In view of the admissions contained in the Plaintiff's written confession and the Settlement Agreement executed between the Plaintiff and Defendant 1, was the learned Judge of the High Court correct in dismissing Defendant 1's application for judgment in the sum of RM1,200,000 against the Plaintiff pursuant to O. 27 r. 3?

D [12] Order 27 r. 3 provides as follows:

**Judgment on admission of facts (O. 27 r. 3)**

E Where admissions of fact are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties, and the Court may give such judgment, or make such order, on the application as it thinks just. An application for an order under this may be made by summons.

F [13] In our view, O. 27 r. 3 empowers the High Court to enter a judgment or order upon a party's admission. Hence, in *Pembinaan SKY Sdn Bhd v. Sykt Federal Furniture Construction & Engineering Works* [1991] 1 CLJ 678; [1991] 1 CLJ (Rep) 346, Ajaib Singh SCJ, speaking for the (then) Supreme Court, affirmed the decision of the High Court which had allowed the plaintiff's application based on a letter of admission of the plaintiff's claim pursuant to Certificates No 29 to 31 for progress payments under a sub-contract. This decision was followed by:

G (1) The High Court in *Aetna Universal Insurance Sdn Bhd v Fire Accident & Marine Sdn Bhd* [2001] 4 CLJ 753, at p. 76 g-h; passage at pp. 1276 and 1277 of the Malaysian Court Practice; and

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(2) The Court of Appeal in *Vithal Kumar Jayaraman v. Azman Md Nor* [2010] 3 CLJ 332; [2010] 2 MLJ 67 at pp. 72 and 73, which also approved my judgment delivered in the High Court in *Tom Manas Enterprise Sdn Bhd v. Soh Ah Wah* [1995] 3 CLJ 610 HC. Ramly Ali JCA who delivered the judgment of the Court of Appeal stressed that:

[21] In determining the issue, the court has to consider the circumstances of the case, particularly when and how the monies were given by the plaintiff to the first defendant. Relevant documents must be considered. These documents may have been in existence before the action was commenced in court. As clearly held by Low Hop Bing J in *Tom Manas Enterprise Sdn Bhd*, there is abundant authority to support the proposition that the court can consider and decide on the admission made before any legal proceedings have been commenced.

[14] In the instant appeal, both the written confession and settlement agreement were executed by the plaintiff on 29 December 2009 before the writ of summons was filed in March 2010. The court can certainly consider and decide on the admission made before any legal proceeding have been commenced: *Vithal Kumar Jayaraman v. Azman Md Nor*, *supra*.

[15] Next, the plaintiff's resistance to defendant 1's application for judgment under O. 27 r. 3 had been further weakened. The plaintiff's own affidavit in reply was filed out of time. The plaintiff had subsequently abandoned her application for extension of time to admit the affidavit, as a result of which, the plaintiff's said affidavit was not admitted at the hearing of defendant 1's application under O. 27 r. 3. In the circumstances, defendant 1's affidavit in support pertaining to the written confession and settlement agreement remains unchallenged. Defendant 1's assertion therein is therefore deemed to have been admitted by the plaintiff: *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609 CA. It is abundantly clear that the admissions of fact, contained in the written confession and the settlement agreement, come within the ambit of O. 27 r. 3.

[16] The learned High Court judge has erred in law and in fact in holding that the plaintiff was under duress, undue influence and coercion when the contemporaneous documents *viz* the written confession and the settlement agreement show otherwise.

**A Conclusion**

[17] With the utmost respect, we are of the view that the learned judge has erred in dismissing defendant 1's application. Hence, our answer to the above question is in the negative.

**B** [18] We therefore allow this appeal, set aside the order of the High Court and substitute it with an order that judgment be entered under O. 27 r. 3 for defendant 1 against the plaintiff in the sum of RM1,200,000 with interest and costs of RM15,000 here and in the court below. Deposit to be refunded to defendant

**C** 1 (appellant).

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